

PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS

Members of the public may submit written comments on draft advisory opinions.

DRAFTS A, B, and C of ADVISORY OPINION 2012-10 are now available for comment. They were requested by Joseph E. Sandler, Esq., and Elizabeth L. Howard, Esq., on behalf of Greenberg Quinlan Rosner Research, Inc., and are scheduled to be considered by the Commission at its public meeting on April 12, 2012. The meeting will begin at 10:00 a.m. and will be held in the 9th Floor Hearing Room at the Federal Election Commission, 999 E Street, NW, Washington, DC. Individuals who plan to attend the public meeting and who require special assistance, such as sign language interpretation or other reasonable accommodations, should contact the Commission Secretary, at (202) 694-1040, at least 72 hours prior to the meeting date.

If you wish to comment on DRAFTS A, B, and C of ADVISORY OPINION 2012-10, please note the following requirements:

- 1) Comments must be in writing, and they must be both legible and complete.
- 2) Comments must be submitted to the Office of the Commission Secretary by hand delivery or fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel by hand delivery or fax ((202) 219-3923).
- 3) Comments must be received by noon (Eastern Time) on April 11, 2012.
- 4) The Commission will generally not accept comments received after the deadline. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.
- 5) All timely received comments will be made available to the public at the Commission's Public Records Office and will be posted on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

REQUESTOR APPEARANCES BEFORE THE COMMISSION

The Commission has implemented a pilot program to allow advisory opinion requestors, or their counsel, to appear before the Commission to answer questions at the open meeting at which the Commission considers the draft advisory opinion. This program took effect on July 7, 2009.

Under the program:

- 1) A requestor has an automatic right to appear before the Commission if any public draft of the advisory opinion is made available to the requestor or requestor's counsel less than one week before the public meeting at which the advisory opinion request will be considered. Under these circumstances, no advance written notice of intent to appear is required. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2).
- 2) A requestor must provide written notice of intent to appear before the Commission if all public drafts of the advisory opinion are made available to requestor or requestor's counsel at least one week before the public meeting at which the Commission will consider the advisory opinion request. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2). The notice of intent to appear must be received by the Office of the Commission Secretary by hand delivery, email (Secretary@fec.gov), or fax ((202) 208-3333), no later than 48 hours before the scheduled public meeting. Requestors are responsible for ensuring that the Office of the Commission Secretary receives timely notice.
- 3) Requestors or their counsel unable to appear physically at a public meeting may participate by telephone, subject to the Commission's technical capabilities.
- 4) Requestors or their counsel who appear before the Commission may do so only for the limited purpose of addressing questions raised by the Commission at the public meeting. Their appearance does not guarantee that any questions will be asked.

FOR FURTHER INFORMATION

Press inquiries: Judith Ingram
Press Officer
(202) 694-1220

Commission Secretary: Shawn Woodhead Werth
(202) 694-1040

Comment Submission Procedure: Kevin Deeley
Acting Associate General Counsel
(202) 694-1650

Other inquiries:

To obtain copies of documents related to Advisory Opinion 2012-10, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at <http://saos.nictusa.com/saos/searchao>.

ADDRESSES

Office of the Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Office of General Counsel
ATTN: Kevin Deeley, Esq.
Federal Election Commission
999 E Street, NW
Washington, DC 20463

AGENDA DOCUMENT NO. 12-22



FEDERAL ELECTION COMMISSION
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2012 APR -6 P 12:27

AGENDA ITEM

For Meeting of 4-12-12

April 6, 2012

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Anthony Herman *AH*
General Counsel

Kevin Deeley *KD*
Acting Associate General Counsel

Amy Rothstein *AR by TL*
Assistant General Counsel

Esther Heiden *EH by TL*
Attorney

Subject: Drafts A, B, and C of AO 2012-10 (Greenberg Quinlan Rosner Research, Inc.)

Attached are proposed drafts of the subject advisory opinion. We have been asked to have these drafts placed on the Open Session agenda for April 12, 2012.

Attachment

1 ADVISORY OPINION 2012-10

2
3 Joseph E. Sandler, Esq.
4 Elizabeth L. Howard, Esq.
5 Sandler, Reiff, Young & Lamb, P.C.
6 1025 Vermont Avenue, NW
7 Suite 300
8 Washington, DC 20005
9

DRAFT A

10 Dear Mr. Sandler and Ms. Howard:

11 We are responding to your advisory opinion request on behalf of Greenberg
12 Quinlan Rosner Research, Inc., concerning the possible preemption of New Hampshire
13 State law by the Federal Election Campaign Act of 1971, as amended (the "Act"), and
14 Commission regulations. The Commission concludes that the provision of the New
15 Hampshire campaign finance statute requiring disclaimers on certain campaign-related
16 telephone surveys is preempted by the Act and Commission regulations.

17 ***Background***

18 The facts presented in this advisory opinion are based on your letter received on
19 February 21 and your email and letter received on March 5, 2012.

20 Greenberg Quinlan Rosner Research, Inc. ("Greenberg Quinlan") is a corporation
21 located in the District of Columbia that provides political research and strategic
22 consulting services. These consulting services include surveys, which are conducted on a
23 nationwide basis and in many states and localities. Greenberg Quinlan's clients include a
24 variety of nonprofit organizations, authorized committees of Federal candidates, labor
25 organizations, political party committees, and other political committees.

26 Greenberg Quinlan plans to conduct telephone surveys, using live operators, of
27 New Hampshire voters. The surveys generally will consist of questions regarding
28 demographics, the respondent's views on various issues, the respondent's impressions of

1 the political parties and national political figures, the likelihood of the respondent to vote
2 for a particular Federal candidate or candidates, and the likelihood of the respondent to
3 vote for a specific Federal candidate after hearing various positive and/or negative
4 information about the candidate.

5 These telephone surveys will be paid for either by Federal candidates or by
6 nonprofit organizations. The surveys will refer only to Federal candidates, and will not
7 mention any candidates for State or local office.

8 Greenberg Quinlan believes that its proposed polling in New Hampshire may be
9 subject to New Hampshire's statutory disclaimer requirements. New Hampshire law
10 requires that:

11 Any person who engages in push-polling, as defined in RSA 664:2(XVII), shall
12 inform any person contacted that the telephone call is being made on behalf of, in
13 support of, or in opposition to a particular candidate for public office, identify that
14 candidate by name, and provide a telephone number from where the push polling
15 is conducted.

16
17 N.H. REV. STAT. sec. 664:16-a(I). "Push polling" is defined as:

- 18 (a) Calling voters on behalf of, in support of, or in opposition to, any
19 candidate for public office by telephone; and
20 (b) Asking questions related to opposing candidates for public office
21 which state, imply, or convey information about the candidates[']
22 character, status, or political stance or record; and
23 (c) Conducting such calling in a manner which is likely to be
24 construed by the voter to be a survey or poll to gather statistical
25 data for entities or organizations which are acting independent of
26 any particular political party, candidate, or interest group.
27

28 N.H. REV. STAT. sec. 664:2(XVII).
29

Greenberg Quinlan asks the Commission to determine whether the Act and Commission regulations preempt the New Hampshire disclaimer statute insofar as it purports to apply to Greenberg Quinlan's proposed telephone surveys that refer only to Federal candidates and do not refer to State or local candidates.

Question Presented

Is a New Hampshire statute requiring disclaimers on certain telephone calls, New Hampshire Revised Statutes section 664:16-a(1), preempted by the Act or Commission regulations with respect to the proposed telephone surveys that refer only to candidates for Federal office and that are made on behalf of, or are in support of or in opposition to, Federal candidates?

Legal Analysis and Conclusions

Yes, the New Hampshire statute requiring disclaimers on certain telephone calls, New Hampshire Revised Statutes section 664:16-a(1), is preempted by the Act and Commission regulations with respect to the proposed telephone surveys that refer only to candidates for Federal office and that are made on behalf of, or are in support of or in opposition to, Federal candidates.

The provisions of the Act and the Commission regulations promulgated thereunder "supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. 453; *see also* 11 CFR 108.7(a). The legislative history of the Act makes clear that Congress intended "to make certain that the Federal law is construed to occupy the field with respect to elections to Federal office and that the Federal law will be the sole authority under which such elections will be regulated." H.R. REP. NO. 93-

1 1239, 93d Cong., 2d Sess. 10 (1974). According to the Conference Committee Report on
2 the 1974 Amendments to the Act, “Federal law occupies the field with respect to criminal
3 sanctions relating to limitations on campaign expenditures, the sources of campaign funds
4 used in Federal races, the conduct of Federal campaigns, and similar offenses, but does
5 not affect the States’ rights” as to other areas such as voter fraud and ballot theft. H.R.
6 REP. NO. 93-1438, 93d Cong., 2d Sess. 69 (1974). The Conference Committee Report
7 also states that Federal law occupies the field with respect to reporting and disclosure of
8 political contributions to, and expenditures by, Federal candidates and political
9 committees, but does not affect State laws as to the manner of qualifying as a candidate,
10 or the dates and places of elections. *Id.* at 100-01.

11 Consistent with congressional intent, Commission regulations provide that “[t]he
12 provisions of the Federal Election Campaign Act of 1971, as amended, and rules and
13 regulations issued thereunder, supersede and preempt any provision of State law with
14 respect to election to Federal office.” 11 CFR 108.7(a). Specifically, “Federal law
15 supersedes State law concerning the . . . [l]imitation[s] on contributions and expenditures
16 . . . regarding Federal candidates and political committees,” but does not supersede State
17 laws relating to the manner of qualifying as a candidate or political party organization,
18 dates and places of elections, voter registration, voting fraud, ballot theft, candidates’
19 personal financial disclosures, or funds used for the purchase or construction of State or
20 local party office buildings. 11 CFR 108.7(c), 108.7(b)(3).

21 In promulgating 11 CFR 108.7, the Commission stated that Federal law
22 supersedes State law with respect to the organization and registration of political

1 committees supporting Federal candidates, disclosure of receipts and expenditures by
2 Federal candidates and political committees, and the limitations on contributions and
3 expenditures regarding Federal candidates and political committees. Explanation and
4 Justification of the Disclosure Regulations, House Doc. No. 95-44, at 51 (1977). “[T]he
5 central aim of the [Act’s preemption] clause is to provide a comprehensive, uniform
6 Federal scheme that is the sole source of regulation of campaign financing . . . for
7 election to Federal office.” Advisory Opinion 1988-21 (Wieder).

8 The New Hampshire statute at issue here is preempted to the extent that it
9 purports to regulate Greenberg Quinlan’s telephone surveys paid for by Federal
10 candidates, their authorized campaign committees, and other Federal political
11 committees. The New Hampshire statute limits expenditures by such individuals and
12 entities by prohibiting them from conducting telephone calls that would fall within the
13 New Hampshire definition of “push-polling” unless they include the requisite
14 disclaimer.¹ Under the Act and Commission regulations, the regulation of expenditures
15 by Federal candidates, their authorized campaign committees, and other Federal political
16 committees is an area to be regulated only by Federal law, and both the Act and
17 Commission regulations regulate this area, including expenditures for polling expenses.
18 *See, e.g.*, 2 U.S.C. 431(9), 439a, 441a(j); 11 CFR 100.111, 106.4, pt. 113.

19 In Advisory Opinion 2009-21 (West Virginia Secretary of State), the Commission
20 determined that the Act and Commission regulations preempted a State law that
21 prohibited “deceptively design[ing] or intentionally conduct[ing] [polls] in a manner

¹ Violations of the disclaimer requirement are misdemeanors if committed by natural persons and felonies if committed by any other persons, in addition to being subject to civil penalties. N.H. REV. STAT. secs. 664:16-a(II); 664:21(V) and (VI).

1 calculated to advocate the election or defeat of any candidate or group of candidates or
2 calculated to influence any person or persons so polled to vote for or against any
3 candidate, group of candidates, proposition or other matter to be voted on by the public at
4 any election.” W. Va. Code 3-8-9(a)(10). The Commission reasoned that the State
5 statute, “if applied to Federal candidates, would impede those candidates’ ability to make
6 payment[s] of polling expenses that are governed by the Act and Commission
7 regulations” and would “limit[] expenditures by candidates and their principal campaign
8 that are otherwise lawful under the Act and Commission regulations.” Advisory Opinion
9 2009-21 (West Virginia Secretary of State).

10 Similarly, the New Hampshire statute, if applied to Federal candidates, their
11 authorized campaign committees, and other Federal political committees who wish to pay
12 for the telephone surveys described in the request, would impede their ability to make
13 payments for polling expenses. Under the Act’s preemption clause, only Federal law
14 may limit the ability of these individuals and entities to make expenditures for polling.² 2
15 U.S.C. 453; 11 CFR 108.7(b)(3). The Commission concludes, therefore, that New
16 Hampshire Revised Statute section 664:16-a(1) is preempted insofar as it purports to
17 apply to the proposed telephone polls paid for by Federal candidates, their authorized
18 campaign committees, and other Federal political committees.³ See 2 U.S.C. 453, 431(9),

² Payments for polling expenses by Federal candidates, their authorized campaign committees, and other Federal political committees are presumed to constitute expenditures under the Act by virtue of the nature of these individuals and entities. See, e.g., *Akins v. Fed. Election Comm’n*, 101 F.3d 731, 742 (D.D.C. 1996), *vacated* 524 U.S. 11 (1998).

³ In MUR 5835 (DCCC), Vice Chairman Petersen and Commissioners Hunter and McGahn concluded that the Act’s disclaimer requirements did not apply to a poll conducted by a national political party committee because the poll did not constitute “general public political advertising.” MUR 5835 (DCCC), Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter and McGahn. Notwithstanding the

1 439a; 11 CFR 108.7(b)(3).

2 The New Hampshire statute also is preempted to the extent that it purports to
3 regulate the proposed telephone calls paid for by nonprofit organizations that are made
4 “in support of, or in opposition to” Federal candidates and that refer only to clearly
5 identified Federal candidates. Although not all telephone calls meeting the description
6 set forth in the New Hampshire statute necessarily would constitute expenditures,⁴ the
7 Act’s preemption clause is not limited to expenditures. As discussed above, the Act
8 “supersede[s] and preempt[s] any provision of State law with respect to election to
9 Federal office.” Congress intended the Act to “occup[y] the field with respect to criminal
10 sanctions relating to limitations on campaign expenditures, the sources of campaign funds
11 used in Federal races, the conduct of Federal campaigns, and similar offenses.” H.R.
12 REP. NO. 93-1438, 93d Cong., 2d Sess. 69 (1974).

13 Although 2 U.S.C. 441d and 11 CFR 110.11 do not require disclaimers for all
14 communications pertaining to Federal elections, the compulsory disclosure of
15 information about communications referencing only Federal candidates – including
16 whether disclaimers are required – is exclusively within the purview of the Act and

inapplicability of 2 U.S.C. 441d in MUR 5835, polls conducted by Federal candidates, their authorized campaign committees, and other Federal political committees are expenditures under the Act and thus regulation thereof is preempted by the Act.

Even assuming *arguendo* that the so-called “push-polling” purported to be covered by the New Hampshire statute constitutes political advertising, the statute imposes a disclaimer requirement on such communications by Federal candidates, their authorized committees, and other Federal political committees, and such regulation of disclaimers under state law thus is preempted by the Act and Commission regulations. See 2 U.S.C. 441d(a), (d)(1); Advisory Opinions 1981-27 (Archer) and 1978-24 (Sonneland).

⁴ See, e.g., *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *Fed. Election Comm’n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986).

1 Commission regulations. Advisory Opinion 1978-24 (Sonneland) (quoting H.R. REP.
2 NO. 93-1438, 93d Cong., 2d Sess. 69 (1974); *see also* Advisory Opinion 1981-27
3 (Archer) and Advisory Opinion 1980-36 (Miller).

4 Therefore, the Act and Commission regulations preempt the New Hampshire
5 statute to the extent that it purports to require any disclaimer beyond that which the Act
6 and Commission regulations may or may not require on Greenberg Quinlan's telephone
7 surveys paid for by nonprofit organizations that support or oppose Federal candidates and
8 refer only to Federal candidates.

9 This response constitutes an advisory opinion concerning the application of the
10 Act and Commission regulations to the specific transaction or activity set forth in your
11 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
12 of the facts or assumptions presented, and such facts or assumptions are material to a
13 conclusion presented in this advisory opinion, then the requestor may not rely on that
14 conclusion as support for its proposed activity. Any person involved in any specific
15 transaction or activity which is indistinguishable in all its material aspects from the
16 transaction or activity with respect to which this advisory opinion is rendered may rely on
17 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
18 conclusions in this advisory opinion may be affected by subsequent developments in the
19 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

20

1 The cited advisory opinions are available on the Commission's website, or directly from
2 the Commission's Advisory Opinion searchable database at <http://www.fec.gov/searchao>.

3

4

On behalf of the Commission,

5

6

7

8

Caroline C. Hunter

9

Chair

10

1 ADVISORY OPINION 2012-10

2
3 Joseph E. Sandler, Esq.
4 Elizabeth L. Howard, Esq.
5 Sandler, Reiff, Young & Lamb, P.C.
6 1025 Vermont Avenue, NW
7 Suite 300
8 Washington, DC 20005
9

DRAFT B

10 Dear Mr. Sandler and Ms. Howard:

11 We are responding to your advisory opinion request on behalf of Greenberg
12 Quinlan Rosner Research, Inc., concerning the possible preemption of New Hampshire
13 State law by the Federal Election Campaign Act of 1971, as amended (the "Act"), and
14 Commission regulations. The Commission concludes that the provision of the New
15 Hampshire campaign finance statute requiring disclaimers on certain campaign-related
16 telephone surveys made on behalf of Federal candidates is preempted by the Act and
17 Commission regulations. The Commission further concludes that the New Hampshire
18 statute is not preempted as applied to telephone surveys made on behalf of nonprofit
19 organizations, where the surveys do not contain express advocacy.

20 ***Background***

21 The facts presented in this advisory opinion are based on your letter received on
22 February 21 and your email and letter received on March 5, 2012.

23 Greenberg Quinlan Rosner Research, Inc. ("Greenberg Quinlan") is a corporation
24 located in the District of Columbia that provides political research and strategic
25 consulting services. These consulting services include surveys, which are conducted on a
26 nationwide basis and in many states and localities.

27 Greenberg Quinlan plans to conduct telephone surveys, using live operators, of
28 New Hampshire voters. The surveys generally will consist of questions regarding

demographics, the respondent's views on various issues, the respondent's impressions of the political parties and national political figures, the likelihood of the respondent to vote for a particular Federal candidate or candidates, and the likelihood of the respondent to vote for a specific Federal candidate after hearing various positive and/or negative information about the candidate. The telephone surveys will not expressly advocate the election or defeat of a clearly identified Federal candidate.

These telephone surveys will be paid for either by Federal candidates or by nonprofit organizations. The surveys will refer only to Federal candidates, and will not mention any candidates for State or local office.

Greenberg Quinlan believes that its proposed polling in New Hampshire may be subject to New Hampshire's statutory disclaimer requirements. New Hampshire law requires that:

Any person who engages in push-polling, as defined in RSA 664:2(XVII), shall inform any person contacted that the telephone call is being made on behalf of, in support of, or in opposition to a particular candidate for public office, identify that candidate by name, and provide a telephone number from where the push polling is conducted.

N.H. REV. STAT. sec. 664:16-a(I). "Push polling" is defined as:

- (a) Calling voters on behalf of, in support of, or in opposition to, any candidate for public office by telephone; and
- (b) Asking questions related to opposing candidates for public office which state, imply, or convey information about the candidates['] character, status, or political stance or record; and
- (c) Conducting such calling in a manner which is likely to be construed by the voter to be a survey or poll to gather statistical data for entities or organizations which are acting independent of any particular political party, candidate, or interest group.

N.H. REV. STAT. sec. 664:2(XVII).

Greenberg Quinlan asks the Commission to determine whether the Act and Commission regulations preempt the New Hampshire disclaimer statute insofar as it purports to apply to Greenberg Quinlan's proposed telephone surveys that refer only to Federal candidates and do not refer to State or local candidates.

Questions Presented

1. *Is a New Hampshire statute requiring disclaimers on certain telephone calls, New Hampshire Revised Statutes section 664:16-a(I), preempted by the Act or Commission regulations with respect to the proposed telephone surveys made on behalf of Federal candidates that refer only to candidates for Federal office?*

2. *Is a New Hampshire statute requiring disclaimers on certain telephone calls, New Hampshire Revised Statutes section 664:16-a(I), preempted by the Act or Commission regulations with respect to the proposed telephone surveys made on behalf of nonprofit organizations that refer only to candidates for Federal office and that are in support of or in opposition to Federal candidates, but do not expressly advocate the election or defeat of a Federal candidate?*

Legal Analysis and Conclusions

1. *Is a New Hampshire statute requiring disclaimers on certain telephone calls, New Hampshire Revised Statutes section 664:16-a(I), preempted by the Act or Commission regulations with respect to the proposed telephone surveys made on behalf of Federal candidates that refer only to candidates for Federal office?*

Yes, the New Hampshire statute requiring disclaimers on certain telephone calls, New Hampshire Revised Statutes section 664:16-a(I), is preempted by the Act and

1 Commission regulations with respect to the proposed telephone surveys that refer only to
2 candidates for Federal office and that are made on behalf of, or are in support of or in
3 opposition to, Federal candidates.

4 The provisions of the Act and the Commission regulations promulgated
5 thereunder “supersede and preempt any provision of State law with respect to election to
6 Federal office.” 2 U.S.C. 453; *see also* 11 CFR 108.7(a). The legislative history of the
7 Act makes clear that Congress intended “to make certain that the Federal law is construed
8 to occupy the field with respect to elections to Federal office and that the Federal law will
9 be the sole authority under which such elections will be regulated.” H.R. REP. NO. 93-
10 1239, 93d Cong., 2d Sess. 10 (1974). According to the Conference Committee Report on
11 the 1974 Amendments to the Act, “Federal law occupies the field with respect to criminal
12 sanctions relating to limitations on campaign expenditures, the sources of campaign funds
13 used in Federal races, the conduct of Federal campaigns, and similar offenses, but does
14 not affect the States’ rights” as to other areas such as voter fraud and ballot theft. H.R.
15 REP. NO. 93-1438; 93d Cong., 2d Sess. 69 (1974). The Conference Committee Report
16 also states that Federal law occupies the field with respect to reporting and disclosure of
17 political contributions to, and expenditures by, Federal candidates and political
18 committees, but does not affect State laws as to the manner of qualifying as a candidate,
19 or the dates and places of elections. *Id.* at 100-01.

20 Consistent with congressional intent, Commission regulations provide that “[t]he
21 provisions of the Federal Election Campaign Act of 1971, as amended, and rules and
22 regulations issued thereunder, supersede and preempt any provision of State law with

1 respect to election to Federal office.” 11 CFR 108.7(a). Specifically, “Federal law
2 supersedes State law concerning the . . . [l]imitation[s] on contributions and expenditures
3 . . . regarding Federal candidates and political committees,” but does not supersede State
4 laws relating to the manner of qualifying as a candidate or political party organization,
5 dates and places of elections, voter registration, voting fraud, ballot theft, candidates’
6 personal financial disclosures, or funds used for the purchase or construction of State or
7 local party office buildings. 11 CFR 108.7(c), 108.7(b)(3).

8 In promulgating 11 CFR 108.7, the Commission stated that Federal law
9 supersedes State law with respect to the organization and registration of political
10 committees supporting Federal candidates, disclosure of receipts and expenditures by
11 Federal candidates and political committees, and the limitations on contributions and
12 expenditures regarding Federal candidates and political committees. Explanation and
13 Justification of the Disclosure Regulations, House Doc. No. 95-44, at 51 (1977). “[T]he
14 central aim of the [Act’s preemption] clause is to provide a comprehensive, uniform
15 Federal scheme that is the sole source of regulation of campaign financing . . . for
16 election to Federal office.” Advisory Opinion 1988-21 (Wieder).

17 The New Hampshire statute at issue here is preempted to the extent that it
18 purports to regulate Greenberg Quinlan’s telephone surveys paid for by Federal
19 candidates that refer only to Federal candidates. The New Hampshire statute limits
20 expenditures by Federal candidates, by prohibiting Federal candidates from conducting
21 telephone calls that would fall within the New Hampshire definition of “push-polling”

1 unless they include the requisite disclaimer.¹ Under the Act and Commission regulations,
2 the regulation of expenditures by Federal candidates is an area to be regulated only by
3 Federal law, and both the Act and Commission regulations regulate this area, including
4 expenditures for polling expenses. *See, e.g.*, 2 U.S.C. 431(9), 439a, 441a(j); 11 CFR
5 100.111, 106.4, pt. 113.

6 In Advisory Opinion 2009-21 (West Virginia Secretary of State), the Commission
7 determined that the Act and Commission regulations preempted a State law that
8 prohibited “deceptively design[ing] or intentionally conduct[ing] [polls] in a manner
9 calculated to advocate the election or defeat of any candidate or group of candidates or
10 calculated to influence any person or persons so polled to vote for or against any
11 candidate, group of candidates, proposition or other matter to be voted on by the public at
12 any election.” W. VA. CODE sec. 3-8-9(a)(10). The Commission reasoned that the State
13 statute, “if applied to Federal candidates, would impede those candidates’ ability to make
14 payment[s] of polling expenses that are governed by the Act and Commission
15 regulations.” Advisory Opinion 2009-21 (West Virginia Secretary of State).

16 Similarly, the New Hampshire statute, if applied to Federal candidates who wish
17 to pay for the telephone surveys described in the request, would impose requirements
18 affecting those candidates’ ability to make payments for polling expenses. Under the
19 Act’s preemption clause, only Federal law may require disclosure regarding expenditures
20 by Federal candidates. 2 U.S.C. 453; 11 CFR 108.7(b)(2). The Commission concludes,
21 therefore, that New Hampshire Revised Statute section 664:16-a(I) is preempted insofar

¹ Violations of the disclaimer requirement are misdemeanors if committed by natural persons and felonies if committed by any other persons, in addition to being subject to civil penalties. N.H. REV. STAT. SECS. 664:16-a(II), 664:21(V), (VI).

as it purports to apply to the proposed telephone polls paid for by Federal candidates. *See* 2 U.S.C. 453, 431(9), 439a.

2. *Is a New Hampshire statute requiring disclaimers on certain telephone calls, New Hampshire Revised Statutes section 664:16-a(1), preempted by the Act or Commission regulations with respect to the proposed telephone surveys made on behalf of nonprofit organizations that refer only to candidates for Federal office, but do not expressly advocate the election or defeat of a clearly identified Federal candidate?*

No, the New Hampshire statute requiring disclaimers on certain telephone calls is not preempted by the Act or Commission regulations with respect to the proposed telephone surveys that will be made on behalf of nonprofit organizations, and that will refer only to candidates for Federal office, but will not expressly advocate the election or defeat of a clearly identified Federal candidate.

As discussed above, "Federal law occupies the field with respect to criminal sanctions relating to limitations on campaign expenditures, the sources of campaign funds used in Federal races, and the conduct of Federal campaigns." H.R. REP. NO. 93-1438, 93d Cong., 2d Sess. 69 (1974). Commission regulations state that "Federal law supersedes State law concerning the . . . [l]imitation[s] on contributions and expenditures . . . regarding Federal candidates and political committees." 11 CFR 108.7(b)(3).

However, "[i]f a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of State law still remains." *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008). The Supreme Court has instructed that the analysis of whether a Federal

1 statute expressly preempts State law begins with “the assumption that the historic police
2 powers of the States [are] not to be superseded by the Federal Act unless that was the
3 clear and manifest purpose of Congress . . . That assumption applies with particular force
4 when Congress has legislated in a field traditionally occupied by the States . . . Thus,
5 when the text of a pre-emption clause is susceptible of more than one plausible reading,
6 courts ordinarily accept the reading that disfavors pre-emption.” *Id.* at 77 (internal
7 citations and quotations omitted). Because “the States are independent sovereigns in our
8 federal system, we have long presumed that Congress does not cavalierly preempt state
9 law.” *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (quoting *Medtronic,*
10 *Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

11 Section 453 has been interpreted narrowly by the courts. In finding that the Act
12 does not preempt State law on the issue of liability of a candidate for debts of an
13 unincorporated campaign committee, the Fifth Circuit stated that a “‘strong presumption’
14 exists against preemption, and ‘courts have given section 453 a narrow preemptive effect
15 in light of its legislative history.’” *Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273, 1280
16 (5th Cir. 1994) (citation omitted). Courts have found that 2 U.S.C. 453 may be
17 susceptible of more than one plausible reading. *See, e.g., Reeder v. Kan. City Bd. of*
18 *Police Comm’rs*, 733 F.2d 543, 545 (8th Cir. 1984).²

² Courts have also suggested that 2 U.S.C. 453 could be interpreted to be limited to regulations that address campaigns and candidates only. The Second Circuit stated that “the narrow wording of this provision suggests that Congress did not intend to preempt state regulation with respect to non-election-related activities.” *Stern v. Gen. Elec. Co.*, 924 F.2d 472, 475 (2d Cir. 1991) (finding 2 U.S.C. 453 did not create express, field, or conflict preemption of a State law governing whether political contributions were corporate waste). In interpreting 2 U.S.C. 453, the Eighth Circuit noted that “the statute can also be read to refer primarily to the behavior of candidates.” *Reeder*, 733 F.2d at 545-46 (finding Congress “intended instead to leave the States free, so far as any claim of preemption was concerned, to allow or forbid political activities, including contributions, by their own employees”).

1 The Act and Commission regulations identify certain communications that must
2 contain disclaimers as to the source of funding for the communication. 2 U.S.C. 441d; 11
3 CFR 110.11. The statute and regulations require disclaimers for: (1) all public
4 communications³ made by a political committee; (2) all public communications by any
5 person that expressly advocate the election or defeat of a clearly identified candidate; (3)
6 all public communications by any person that solicit contributions; and (4) all
7 electioneering communications.⁴ The telephone surveys described in the request do not
8 fall within the scope of the definition of electioneering communication, nor do they
9 solicit contributions or expressly advocate the election or defeat of a clearly identified
10 Federal candidate. Assuming that the nonprofit organizations discussed in the request are
11 not political committees, the telephone surveys described in the request are not subject to
12 the Act's disclaimer requirements.⁵

13 Because the proposed telephone surveys made on behalf of nonprofit
14 organizations that are not political committees are not covered by the Act and New
15 Hampshire Revised Statute section 664:16-a(I) does not impose a limitation on

³ "Public communication" is defined in the regulations as "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising." 11 CFR 100.26.

⁴ "Electioneering communication" is defined in the regulations as "any broadcast, cable, or satellite communication that: (1) Refers to a clearly identified candidate for Federal office; (2) Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and (3) Is targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives." 11 CFR 100.29(d).

⁵ Based upon your request and subsequent communications, the Commission understands your request's reference to surveys "paid for by nonprofit organizations" to be limited to nonprofit organizations that are not political committees as defined by the Act and Commission regulations.

1 expenditures or contributions, Federal law does not preempt the New Hampshire state
2 law as to any disclaimers that may be required on the proposed telephone surveys made
3 on behalf of nonprofit organizations that are not political committees.⁶

4 This response constitutes an advisory opinion concerning the application of the
5 Act and Commission regulations to the specific transaction or activity set forth in your
6 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
7 of the facts or assumptions presented, and such facts or assumptions are material to a
8 conclusion presented in this advisory opinion, then the requestor may not rely on that
9 conclusion as support for its proposed activity. Any person involved in any specific
10 transaction or activity which is indistinguishable in all its material aspects from the
11 transaction or activity with respect to which this advisory opinion is rendered may rely on
12 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
13 conclusions in this advisory opinion may be affected by subsequent developments in the
14 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

⁶ As discussed above, in Advisory Opinion 2009-21 (West Virginia Secretary of State), the Commission determined that the Act and Commission regulations preempted a State law that prohibited “deceptively design[ing] or intentionally conduct[ing] [polls] in a manner calculated to advocate the election or defeat of any candidate or group of candidates or calculated to influence any person or persons so polled to vote for or against any candidate, group of candidates, proposition or other matter to be voted on by the public at any election.” W. VA. CODE sec. 3-8-9(a)(10). However, the West Virginia statute in question applied to political committees, defined as “any candidate committee, political action committee or political party committee.” W. VA. CODE sec. 3-8-1a(20). The Commission reasoned that the State statute, “if applied to Federal candidates, would impede those candidates’ ability to make payment[s] of polling expenses that are governed by the Act and Commission regulations.” Advisory Opinion 2009-21 (West Virginia Secretary of State).

1 The cited advisory opinions are available on the Commission's website, or directly from
2 the Commission's Advisory Opinion searchable database at <http://www.fec.gov/searchao>.

3

4

On behalf of the Commission,

5

6

7

8

Caroline C. Hunter
Chair

9

1 **ADVISORY OPINION 2012-10**

2
3 Joseph E. Sandler, Esq.
4 Elizabeth L. Howard, Esq.
5 Sandler, Relff, Young & Lamb, P.C.
6 1025 Vermont Avenue, NW
7 Suite 300
8 Washington, DC 20005

DRAFT C

9
10 Dear Mr. Sandler and Ms. Howard:

11 We are responding to your advisory opinion request on behalf of Greenberg
12 Quinlan Rosner Research, Inc., concerning the possible preemption of New Hampshire
13 State law by the Federal Election Campaign Act of 1971, as amended ("FECA" or the
14 "Act"), and Commission regulations. Although the Commission believes that the Act
15 likely preempts the New Hampshire law, Greenberg Quinlan Rosner Research, Inc.
16 would not be entitled to rely on any opinion the Commission may render concerning this
17 request for the proposed transactions and activities.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on
20 February 21 and your email and letter received on March 5, 2012.

21 Greenberg Quinlan Rosner Research, Inc. ("Greenberg Quinlan") is a corporation
22 located in the District of Columbia that provides political research and strategic
23 consulting services. These consulting services include surveys, which are conducted on a
24 nationwide basis and in many states and localities. Greenberg Quinlan's clients include a
25 variety of nonprofit organizations, authorized committees of Federal candidates, labor
26 organizations, political party committees, and other political committees.

27 Greenberg Quinlan plans to conduct telephone surveys, using live operators, of
28 New Hampshire voters. The surveys generally will consist of questions regarding

1 demographics, the respondent's views on various issues, the respondent's impressions of
2 the political parties and national political figures, the likelihood of the respondent to vote
3 for a particular Federal candidate or candidates, and the likelihood of the respondent to
4 vote for a specific Federal candidate after hearing various positive and/or negative
5 information about the candidate.

6 These telephone surveys will be paid for either by Federal candidates or by
7 nonprofit organizations. The surveys will refer only to Federal candidates, and will not
8 mention any candidates for State or local office.

9 Greenberg Quinlan believes that its proposed polling in New Hampshire may be
10 subject to New Hampshire's statutory disclaimer requirements. New Hampshire law
11 requires that:

12 Any person who engages in push-polling, as defined in RSA 664:2(XVII), shall
13 inform any person contacted that the telephone call is being made on behalf of, in
14 support of, or in opposition to a particular candidate for public office, identify that
15 candidate by name, and provide a telephone number from where the push polling
16 is conducted.

17
18 N.H. REV. STAT. sec. 664:16-a(I). "Push polling" is defined as:

- 19 (a) Calling voters on behalf of, in support of, or in opposition to, any
20 candidate for public office by telephone; and
21 (b) Asking questions related to opposing candidates for public office
22 which state, imply, or convey information about the candidates[']
23 character, status, or political stance or record; and
24 (c) Conducting such calling in a manner which is likely to be
25 construed by the voter to be a survey or poll to gather statistical
26 data for entities or organizations which are acting independent of
27 any particular political party, candidate, or interest group.
28

29 N.H. REV. STAT. sec. 664:2(XVII).
30

Greenberg Quinlan asks the Commission to determine whether the Act and Commission regulations preempt the New Hampshire disclaimer statute insofar as it purports to apply to Greenberg Quinlan's proposed telephone surveys that refer only to Federal candidates and do not refer to State or local candidates.

Question Presented

Is a New Hampshire statute requiring disclaimers on certain telephone calls, New Hampshire Revised Statutes section 664:16-a(I), preempted by the Act or Commission regulations with respect to the proposed telephone surveys that refer only to candidates for Federal office and that are made on behalf of, or are in support of or in opposition to, Federal candidates?

Legal Analysis and Conclusions

Although the Act likely preempts the New Hampshire statute at issue, the Commission is not the appropriate body to decide this question. The Advisory Opinion process allows requestors to predetermine whether specific activities are permissible under the Act – not whether those activities are permissible under a state's laws. Thus, an affirmative advisory opinion only precludes enforcement actions under FECA. It remains the province of the judiciary to determine whether FECA preempts -- and thus precludes -- similar state enforcement actions.

A. The Act Appears To Preempt the New Hampshire Statute with respect to Communications that only Identify Federal Candidates

First, the New Hampshire law likely is preempted under the Act's preemption provision at Section 453. The provisions of the Act and the Commission regulations promulgated thereunder "supersede and preempt any provision of State law with respect

1 to election to Federal office.” 2 U.S.C. 453; *see also* 11 CFR 108.7(a). Commission
2 regulations specify that, “Federal law supersedes State law concerning the . . .
3 [l]imitation[s] on contributions and expenditures . . . regarding Federal candidates and
4 political committees,” but does not supersede State laws relating to the manner of
5 qualifying as a candidate or political party organization, dates and places of elections,
6 voter registration, voting fraud, ballot theft, candidates’ personal financial disclosures, or
7 funds used for the purchase or construction of State or local party office buildings. 11
8 CFR 108.7(c), 108.7(b)(3). With regard to Federal candidates, their authorized
9 committees, and other Federal political committees, the New Hampshire statute would
10 prohibit expenditures for communications that meet its definition of “push-polling”
11 unless they include required disclaimers. As a result, it seems clear that the New
12 Hampshire statute is preempted from regulating Greenberg Quinlan’s telephone surveys
13 paid for by Federal candidates, their authorized campaign committees, and other Federal
14 political committees.

15 Similarly, the Act likely preempts the New Hampshire statute as applied to
16 persons other than Federal Candidates, their authorized campaign committees, and other
17 Federal political committees. It is true that, when paid by persons other than Federal
18 candidates and political committees, not all telephone calls meeting the New Hampshire
19 statute’s description constitute expenditures.¹

20 It is also true that Commission regulations do not require disclaimers for all
21 communications pertaining to Federal elections. *See* 2 U.S.C. 441d and 11 CFR 110.11.

¹ *See, e.g., Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *Fed. Election Comm’n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986).

1 But the Act “supersede[s] and preempt[s] any provision of State law with respect to
2 election to Federal office” not just expenditures. 2 U.S.C. 453. And the compulsory
3 disclosure of information about communications referencing only Federal candidates –
4 including whether disclaimers are required – appears exclusively to be within the purview
5 of the Act and Commission regulations. *See* Advisory Opinion 1978-24 (Sonneland)
6 (quoting H.R. REP. NO. 93-1438, 93d Cong., 2d Sess. 69 (1974)); Advisory Opinion
7 1981-27 (Archer) and Advisory Opinion 1980-36 (Miller).

8 The New Hampshire statute purports to regulate communications made “on behalf
9 of, in support of, or in opposition to” Federal candidates by requiring disclaimers beyond
10 that which the Act and Commission regulations may or may not require. This appears to
11 impermissibly regulate a field of activity that Congress expressly reserved for the Act and
12 Commission regulations to occupy. *See id.*; *see also* H.R. REP. NO. 93-1239, 93d Cong.,
13 2d Sess. 10 (1974) (Congress intended “to make certain that the Federal law is construed
14 to occupy the field with respect to elections to Federal office and that the Federal law will
15 be the sole authority under which such elections will be regulated.”).

16 **B. Nevertheless, An Advisory Opinion Does Not Have Legal Effect over**
17 **State Law**

18 Notwithstanding the above analysis, this advisory opinion does not provide
19 requestor with legal relief from the New Hampshire law. The Act provides, in relevant
20 part, that:

21 Not later than 60 days after the Commission receives from a person a
22 complete written request concerning the application of this Act, chapter 95
23 or chapter 96 of title 26, or a rule or regulation prescribed by the
24 Commission, with respect to a specific transaction or activity by the
25 person, the Commission shall render a written advisory opinion relating to

1 such transaction or activity to the person.

2
3 2 U.S.C. §437f(a)(1). The legal effect of the Commission's advisory opinions is that
4 "any person who relies upon any provision or finding of any advisory opinion . . . shall
5 not, as a result of any such act, be subject to any sanction provided by this Act or by
6 chapter 95 or chapter 96 of title 26 [of the United States Code]." 2 U.S.C. §437f(c)(2).

7 The Commission determines that the request presented here concerns the
8 application of a state statute to the proposed activities more than the application of the
9 Act to those activities. The request does not raise any specific questions about which, if
10 any, of the Act's disclaimer provisions apply to the Requestor's telephone calls. Rather,
11 the Request asks generally whether a specific New Hampshire statute applies to
12 Requestor's proposed activities, or whether they are preempted by the Act.

13 In other words, the Requestor is not seeking an advisory opinion to protect itself
14 from enforcement against a violation of any of the Act's prohibitions or requirements
15 relating to its proposed activities. Instead, Requestor is seeking an advisory opinion to
16 protect itself from enforcement against a violation of New Hampshire laws. Any answer
17 from the Commission regarding the application of the New Hampshire law that is the
18 subject of this request provides little protection for the Respondent from actions brought
19 under that state law. Cf. 11 CFR 112.1(b) (providing that "[r]equests presenting a general
20 question of interpretation . . . do not qualify as advisory opinion requests"). Such
21 protection is more properly provided by the judiciary.

22 The Commission recognizes that it has issued advisory opinions previously on
23 questions regarding the Act's preemption of State laws on various issues. Most recently,

1 the Commission concluded, in a request submitted by the West Virginia Secretary of
2 State, that the Act preempts a West Virginia statute regulating payment for polling
3 expenses by candidates and political committees. Advisory Opinion 2009-21. In that
4 opinion, however, it was the State itself that requested the Commission's opinion as to
5 whether its own laws applied to the activity at issue, and it was within the State's power
6 to decide whether and how to proceed with the enforcement of its own laws based on that
7 opinion. Thus, the Commission's advisory opinion in that matter had greater saliency
8 than it would in this matter, where the Requestor would not have it within its own power
9 to create exemptions to the State statutes at issue based on any opinion the Commission
10 may render.

11 This response constitutes an advisory opinion concerning the application of the
12 Act and Commission regulations to the specific transaction or activity set forth in your
13 request. *See* 2 U.S.C. 437f. The cited advisory opinions are available on the
14 Commission's website, or directly from the Commission's Advisory Opinion searchable
15 database at <http://www.fec.gov/searchao>.

16
17 On behalf of the Commission,

18
19
20
21 Caroline C. Hunter
22 Chair